Nos. 11,581 and 11,772

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JAMES A. DAGGS, *Appellant,* vs. GROVER C. KLEIN, Rear Admiral, United States Navy, Commandant, Mare Island Navy Yard and JAMES V. FORRESTAL, Secretary of the Navy, *Appellees.*	No. 11,581
JOHN BRAITO, *Appellant,* vs. GROVER C. KLEIN, Rear Admiral, United States Navy, Commandant, Mare Island Navy Yard and JAMES V. FORRESTAL, Secretary of the Navy, *Appellees.*	No. 11,772

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

BRIEF FOR APPELLEE.

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BRIEF FOR APPELLEE.

PRELIMINARY STATEMENT.

These cases are before the Court for consideration together because of the fact that they involve in substance the same facts and this Court on September 25, 1947, ordered that appellee might file one brief in both cases and that they be consolidated for hearing.

In the *Daggs* case, No. 11,581, the District Court dismissed the case *"sua sponte"* as not within its jurisdiction.

Following the decision the complaint in the *Braito* case, No. 11,772, was amended by adding a paragraph.[1] The District Court in that case granted a motion to dismiss, holding that the Secretary of the Navy was an indispensable party.

OPINIONS BELOW.

The opinions of the District Court in each case are set out in full in the transcript of record.

No. 11,581 (T. R. pp. 13-18); No. 11,772 (T. R. pp. 27-28).

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[1] "XIII.

That the action of the defendants in removing the plaintiff from his employment, as aforesaid, was, and is, a violation of the rights guaranteed to the plaintiff by the first and fifth amendments to the Constitution of the United States, in that said action abridged plaintiff's freedom of speech, of the press, and his right, peaceably, to assemble, and in that said action deprived plaintiff of his property without due process of law."

JURISDICTION.

The jurisdiction exercised by the Courts below was by virtue of the provisions of 28 U.S.C. 41.

The jurisdiction of this Court to review the orders of the District Court is conferred by 28 U.S.C. 225.

STATUTES INVOLVED.

The statutes involved, 50 U.S.C. App. 1156 and 5 U.S.C. 652, are set out in full in appellants' briefs.

(Daggs Brief, pp. 2-3; Braito Brief, pp. 3-4.)

FACTS.

The facts before this Court appear from the pleadings and the rulings and opinions of the Courts below. The facts as disclosed by the pleadings are summarized correctly in appellants' briefs.

(Daggs Brief, pp. 3-4; Braito Brief, pp. 5-6.)

Such facts are the same in each case, notwithstanding the amendment to the complaint in the *Braito* case[1], supra. There was already in the *Daggs* case, and in the original Braito complaint, an allegation that the controversy was one arising under the Constitution and Laws of the United States. The argumentative statement of the pleaders' legal conclusions relative to description of such controversy adds nothing.

QUESTIONS PRESENTED.

Since the cases are being heard by the Court as one, and the facts are the same, it seems clear that the order dismissing the cases may be affirmed by this Court on the grounds stated by the District Courts in either case, or on any other ground sufficient to justify such rulings.

This is, in effect, the position taken by appellants. (Daggs Brief, p. 6; Braito Brief, p. 8.)

There is then one and only one question and that is the same in both cases:

Did the Courts below err in dismissing plaintiffs' complaints?

ARGUMENT.

For the purpose of the Court's convenience we shall arrange our argument to conform to the arrangement of argument in appellants' briefs.

I.

Answering appellant's brief. (Daggs Brief, pp. 6-46.)

THERE IS NO JUSTICIABLE FEDERAL QUESTION PRESENTED.

Until the decision of the Supreme Court in *Bell v. Hood,* 327 U. S. 678, it had been assumed that no such action was within the jurisdiction of the District Court unless the Constitution or a law of the United

States afforded a remedy for the asserted wrong; the dissenting opinion in the *Bell* case makes this clear. (p. 685-686.) It is also clear that the case here stated is, even under that decision, not a justiciable controversy. It is not an action for damages and Admiral Friedell, whose alleged wrongful act is complained of, is not a party.

II.

Answering appellants' briefs (Daggs, pp. 46-62; Braito, p. 17.)

Assuming that there is a cause of action cognizable in some Federal Court:

THE DISTRICT COURT DID NOT HAVE JURISDICTION OF SUCH ACTION.

A. The District Court had no jurisdiction over the Secretary of the Navy.

It is admitted that he was not served; that he did not submit himself to the Court's jurisdiction, and that without his consent no Court other than that of the District of Columbia where he resides may acquire jurisdiction over him.

5 *U.S.C.* 411, Residence of Secretary of Navy; *Ferris v. Wilbur,* 27 Fed. 262-263.

B. Answering (B) Appellants' Brief. (Daggs pp. 49-56; Braito pp. 9-16.)

THE SECRETARY OF THE NAVY IS AN INDISPENSABLE PARTY.

The purpose of the action is clear from the relief sought, reinstatement, compensation during the period

of removal at former pay, and restoration of accrued leave.[2]

The terms of the statute under which the plaintiffs were discharged make both discharge and reinstatement dependent on "the opinion of the Secretary concerned."

The complaints in each case state, in effect, that the discharge complained of was with the approval of the Secretary.

In such a case it is evident that the action sought to be directed is that of the Secretary.

We do not contend that no Court may "mandamus" the Secretary of the Navy; merely that neither of the Courts below had jurisdiction so to do.

The cases cited by plaintiff (pp. 53-56, Daggs Brief) are cases where jurisdiction over the Secretarys concerned existed, or where the cases were expressly against the United States. What we had in mind is clear from the pleadings.

The defendant over whom the District Court had personal jurisdiction, Admiral Klein, cannot grant

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[2] "Wherefore, plaintiff prays judgment:

"1. That defendants be ordered forthwith to reinstate plaintiff as a civil service employee at the Mare Island Yard in the same capacity in which plaintiff was working at the time of his discharge.

"2. That defendants be ordered to compensate plaintiff for the period of his removal at the rate of pay plaintiff was receiving on the date of his discharge.

"3. That defendants be ordered to reinstate the right of plaintiff to accrued leave with pay as the same existed on the date of discharge."

(Tr. of R. 11,772—pp. 23-24.)
(Tr. of R. 11,581—pp. 9-10.)

the relief sought, as that is an exclusive function of the Secretary.

Whether any action of any nature can lie against Admiral Klein founded upon his predecessor's alleged wrongful acts is questionable.[3]

The principles of law involved have been recently stated in *Williams v. Fanning,* 332 U. S. 490, in such a manner as to settle beyond any doubt the question here presented. The Court through Mr. Justice Douglas, stated, referring to the line of such cases holding superior officers to be indispensable parties:

> "These cases evolved the principle that the superior officer is an indispensable party if the decree granting the relief sought will require him to take action, either by exercising directly a power lodged in him or by having a subordinate exercise it for him."
>
> (P. 493.)

Referring to the line of cases holding the opposite view, he stated:

> "In those situations relief against the offending officer could be granted without risk that the judgment awarded would 'expend itself on the

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[3]It is not alleged that there is any privity between Admiral Klein, who is the sole remaining defendant, and his predecessor Admiral Friedell.

Cf. *Ex parte La Prade,* 289 U.S. 444;

Chief Justice Taft's statement in *Gorham Mfg. Co. v. Wendell,* 261 U.S. 1-4:

"* * * the inherent difficulty in these (substitution cases) is not the liability and suability of the successor in a new suit. It is in the shifting from the personal liability of the first officer for threatened wrong or abuse of his office to the personal liability of his successor when there is no privity between them."

public treasury or domain, or interfere with the public administration'. *(Land v. Dollar,* 330 U. S. 731, 738.)"

(P. 493.)

He announced the test to be "* * * if the decree which is entered will effectively grant the relief desired by expending itself on the subordinate official who is before the Court."

Here it is clear that the relief sought would require the Secretary to reinstate plaintiffs as that power is by statute exclusive in him; it is equally clear that the judgment sought, if awarded "would expend itself on the public treasury * * *, or interfere with public administration."

C. THE ACTION SEEKS TO CONTROL THE EXERCISE OF A DISCRETIONARY EXECUTIVE FUNCTION.

That the function of discharging, or of reinstating discharged employees is, under the statute in question, within the discretion of the Secretary and exclusive in him, is clear from the language of the statute. Both functions are exercisable when in his "opinion" their exercise is warranted. The suits without the Secretary as a party seek to force him to exercise this executive discretion through a subordinate.

Warner Valley Stock Co. v. Smith, 165 U. S. 28-33-35;

Webster v. Fall, 266 U. S. 507;

Adams v. Nagle, 303 U. S. 532-540-542.

The discretionary executive function so sought to be controlled is one which under normal conditions Courts have declined to attempt to control, particularly in cases where, as here, to grant the relief sought would be an idle act.

U. S. ex rel. Greathouse v. Dern, 289 U. S. 352-360.

D. THE AMOUNT CLAIMED IS BEYOND THE JURISDICTION OF THE DISTRICT COURT.

That the actions are in effect against the United States seems obvious from what has already been stated under A, B and C, supra.

It is evident that the money judgment sought (back pay for the periods concerned) "would expend itself on the public treasury." It is equally evident that the amount so sought to be collected would exceed the jurisdiction of the District Court.

Considering the case as one against the United States over which some Federal Court has jurisdiction it is apparent that such jurisdiction is exclusive in the Court of Claims.

28 *U. S.C.* 41, subdiv. 20.

E. THE SUITS ARE AGAINST THE UNITED STATES.

This point has been involved in practically all the foregoing discussion, and is in our opinion the real basis for the requirement that the superior officer be

joined in all cases where the judgment sought may affect the public treasury or interfere with public administration. In such cases a governmental interest is involved.

Here the District Court, not having jurisdiction over the person of the Secretary, lacks jurisdiction to make any decision concerning the governmental function which he exercises, just as, absent personal jurisdiction, no judgment may be rendered against him.

Under the circumstances of these cases where the function of *discharging* exercised, and that of *reinstating* sought to be directed, are exclusive in the Secretary and by plain language of the statute discretionary, there can be no question but that the requested relief affects the public administration. In such case the suit is against the United States which, if it has consented to be sued in such a case (mandamus) has designated another forum.

The Government's interest is to be determined from "the essential nature and effect of the proceeding as it appears from the entire record."

Ex parte New York, 256 U. S. 490-500.

The effect of these proceedings would clearly be to burden the Treasury of the United States by award of back pay during the period of removal and to interfere with the public administration of the law. In such a case it seems clear that these cases fall within the rule stated in *Transcontinental & Western Air v. Farley,* 71 F. (2d) 288-290, rather than the exception

to that rule relied on by appellant. (App. Brief Daggs, pp. 57-62.)

Mine Safety Appl. Co. v. Forrestal, 326 U. S. 371-374.

CONCLUSION.

In these cases there was no defendant other than Admiral Klein before the District Court. It is clear that he may not be held responsible for the acts of his predecessor.

Any relief granted, if of any effect, must impinge on the government; back pay—on the Treasury; reinstatement—on the public administration.

The District Court was in each case requested to do an idle act in the exercise of a non-existent jurisdiction. The dismissals were each proper on the grounds stated by the District Courts and the judgments and orders of dismissal should be affirmed.

Dated, San Francisco,
May 3, 1948.

Respectfully submitted,

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